**The New York Times Company *and* Newspaper Guild of New York, Local 3 TNG, AFL-CIO.** Case 2-CA-18303

November 10, 1982

## ORDER REMANDING PROCEEDING FOR FURTHER HEARING

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On July 22, 1982, a hearing was held before Administrative Law Judge William A. Gershuny in the above-entitled proceeding. Prior to the presentation of any evidence on the merits of the case, Respondent moved to dismiss the complaint. On August 3, 1982, the Administrative Law Judge issued the attached "Order Granting Respondent's Motion To Dismiss" the complaint. Thereafter, the General Counsel filed exceptions and the Charging Party filed a request for review of the Administrative Law Judge's Order. Both the General Counsel and the Charging Party moved the Board to remand for a hearing *de novo* before a different administrative law judge. Respondent filed a memorandum in support of the Administrative Law Judge's Order.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

In dismissing the complaint, which alleges a violation of Section 8(a)(5) of the Act, based on Respondent's refusal to provide the Union with employees' job evaluation reports, the Administrative Law Judge concluded, *inter alia*, that, since the Union had "equal access to the information" sought, "its subsequent demand under Section 8(a)(5) lacks the essential element of good faith." To the extent that dismissal of the complaint is grounded on the alleged availability of the requested information from other sources, the Administrative Law Judge erred as a matter of law. *The Kroger Company*, 226 NLRB 512 (1976). The fact that employees may have the information and may be or are willing to give it to the union does not relieve an employer of its obligations under Section 8(a)(5) of the Act. See *Bel-Air Bowl, Inc.*, 247 NLRB 6 (1980). Cf. *The Proctor & Gamble Manufacturing Company*, 603 F.2d 1310 (8th Cir. 1979), enfg. 237 NLRB 747 (1978).

We also find merit to the General Counsel's and the Charging Party's requests that this matter be remanded for a hearing *de novo* before a different administrative law judge. Both on the record, and in his Order dismissing the complaint, the Administrative Law Judge impugned the good faith of the Union and questioned whether the General Counsel and the Charging Party were abusing the Board's processes. We have carefully examined the record and find no support for the Administrative Law Judge's conclusion that the General Counsel and the Charging Party are not pursuing this matter in good faith. In conducting our hearing, it is the Board's policy not only to avoid actual partiality and prejudgment, but also to avoid even the appearance thereof. See *Filmation Associates, Inc.*, 227 NLRB 1721 (1977); *The Center for United Labor Action*, 209 NLRB 814 (1974). Accordingly, we shall set aside the Administrative Law Judge's Order and shall remand this proceeding to the Chief Administrative Law Judge for a hearing *de novo* before a different administrative law judge duly designated by him, who shall prepare and serve on the parties a decision containing findings of fact, conclusions of law, and recommendations with respect to the unfair labor practices alleged in the complaint herein.

## ORDER

It is hereby ordered that the Order Granting Respondent's Motion To Dismiss is set aside.

IT IS FURTHER ORDERED that a hearing *de novo* be held before a different administrative law judge for the purpose of receiving evidence on the issues raised by the allegations of the complaint.

IT IS FURTHER ORDERED that, upon conclusion of the hearing, the administrative law judge shall prepare and serve upon the parties a decision containing findings of fact, conclusions of law, and recommendations based on the evidence received and that, following service of such decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations, Series 8, as amended, shall be applicable.

## ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

WILLIAM A. GERSHUNY, Administrative Law Judge: Respondent, by oral motion made at the hearing which commenced in New York City on July 22, 1982, seeks dismissal of the complaint which alleges a violation of Section 8(a)(5) based on an alleged refusal by Respondent to furnish job evaluation reports of one bargaining unit member which the Union claims are necessary for the performance of its bargaining responsibility. Dismissal is sought on the grounds that, at all relevant times, the Union had unrestricted access to the reports and that, at the time of the hearing, it was in actual possession of them.

The facts relevant to this motion are not in dispute, having been the basis of uncontroverted representations of counsel at the telephonic pretrial conference of July 16, 1982, and at the hearing which commenced on July

19, 1982, as to other unrelated, but previously consolidated cases); that at all relevant times it has been the policy of Respondent to provide its bargaining unit employees, upon request, with personnel file copies of job evaluation reports for their unrestricted use; that this policy was known to employees and the Union; that at no time prior to July 19, 1982, did the Union avail itself of this existing procedure by requesting the employee to obtain the reports and provide them to the Union for its use; that at no time did the Union have reason to believe that the employee would not cooperate in obtaining the reports for use by the Union; that on July 19, 1982, at my request, the Union did avail itself of this preexisting procedure by asking the employee to obtain said reports for its use; and that on July 20, 1982, 2 days before commencement of the hearing in this case, the Union came into unrestricted possession of said reports.

Nevertheless, the Union—joined by the General Counsel—contends that it is entitled to litigate the issue of whether Respondent is obligated, under Section 8(a)(5), to furnish the reports in precisely the manner requested by it; i.e., production directly to the Union by Respondent. The fact that it already has the reports, it contends, is wholly irrelevant.

I cannot agree and, for reasons set forth below, the motion is granted and the complaint dismissed.

It is by now hornbook law that the statutory obligation of an employer, under Section 8(a)(5), to supply a union with sufficient information to enable it to perform its bargaining and grievance-handling functions is premised upon the belief that a union would be unable to perform its duties properly without such information and that, as a corollary, no such obligation exists where a union already is in possession of such information or where it has equal access to the information. Morris, "The Developing Labor Law," p. 309, *et seq.* (1971). Here, the Union at all times had access to the reports and, at the time of the hearing, had them in its possession. This is not a case where an employer, on the courthouse steps, so to speak, produces the information untimely, thus seeking to avoid litigation and the risk of an unfair labor practice finding; it did nothing but assert, in its answer and orally at the pretrial conference that the Union in fact had access to the information. Nor is this a case where the employee whose evaluation reports were being sought was uncooperative, was not a union member, or was no longer employed; under those circumstances, an entirely different result might be warranted. Nor is this a case where the Union seeks the evaluation reports of a large number of bargaining unit members, whose total cooperation might be difficult or impossible to obtain. Rather this is a case no different from one in which the requested information is available to the Union in a public library, a published financial report, or a trade publication; or one in which the Union has already obtained the information by lawful or even unlawful means. Where, as here, the Union is in possession of the information or has reasonable, alternative means by which to acquire it, its subsequent demand under Section 8(a)(5) lacks the essential element of good faith.

Other reasons compel dismissal here: one, the Charging Party, as evidenced by argument of counsel on July 22, 1982, seeks in effect a declaratory ruling (one not authorized by Board Rules) which would have precedential effect in cases involving other employers with whom the Newspaper Guild has a bargaining relationship; and the other that, under the circumstances of this case, it would be unconscionable to impose additional burdens on an already overburdened process for the resolution of unfair labor practices and additional costs on the Board and on the private parties.

For these reasons and for reasons stated on the record at the July 22, 1982 hearing in this case, it is, Ordered and Directed that Respondent's motion to dismiss be, and the same hereby is, granted and the complaint be, and the same hereby is, dismissed.